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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

OUR CHURCH BUILDING, INC.,

Cross-complainant and Respondent,

v.

VIKTOR TSESHKOVSKY,

Cross-defendant and Appellant.

B300027

(Los Angeles County
Super. Ct. No. 18STCV09423)

APPEAL from an order of the Superior Court of
Los Angeles County, Daniel S. Murphy, Judge. Affirmed.

Daley & Heft, Lee H. Roistacher, Robert W. Brockman,
Jr. and David K. Haber for Cross-defendant and Appellant.

Snell & Wilmer, Todd E. Lundell, Keith M. Gregory,
and Daniel G. Seabolt for Cross-complainant and
Respondent.

INTRODUCTION

Appellant Viktor Tseshkovsky appeals from the denial of his motion filed under Code of Civil Procedure section 425.16, commonly known as the anti-SLAPP statute. (See *Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 615 (*Rand Resources*).) Appellant is the Parish Rector of the Protection of the Holy Virgin Russian Orthodox Church (the Church), which is not a party to this appeal. Decades ago, respondent Our Church Building (OCB), a nonprofit religious corporation, was formed for the purpose of owning and handling real property for the Church. OCB's bylaws provide that appellant, as Parish Rector, is a voting member of OCB's Board of Directors, and allegedly further provide that the Church has the right to purchase certain real property from OCB. Appellant and the Church sued OCB in late December 2018, seeking, inter alia, an order for specific performance of OCB's alleged obligation to sell the property to the Church.

In late March 2019, OCB filed a cross-complaint against appellant and the Church, asserting two causes of action: (1) breach of fiduciary duty; and (2) defamation. In OCB's background allegations, it alleged that "over at least the last year" (i.e., from March 2018, at the latest, to March 2019), appellant had spread lies to Church members about, inter alia, the alleged requirement to sell the property. Within its breach of fiduciary duty count, OCB alleged that appellant had advocated the property sale and spread unspecified lies about OCB and its leadership. Within its

defamation count, OCB alleged that appellant had made several defamatory statements about OCB in connection with, inter alia, the alleged requirement to sell the property.

Appellant, as cross-defendant, filed an anti-SLAPP motion to strike OCB's cross-complaint, arguing that the cross-complaint arose from statements that were protected under Code of Civil Procedure section 425.16, subdivision (e)(2) (Subdivision (e)(2)) because they were made in connection with issues under consideration or review in this action. In his briefing and supporting declaration, appellant emphasized that the cross-complaint was bereft of detail concerning the context and content of his alleged statements, without attempting to provide such detail himself. The trial court denied the motion, concluding that appellant had failed to show that the statements from which the cross-claims arose were made after he filed this litigation, or that they were made in anticipation of litigation contemplated in good faith and under serious consideration, as required to establish protection under Subdivision (e)(2) for pre-litigation statements.

On appeal, appellant contends the trial court erred in denying his anti-SLAPP motion. He again relies on Subdivision (e)(2) and, for the first time, attempts to rely on Code of Civil Procedure section 425.16, subdivision (e)(4) (Subdivision (e)(4)), which protects statements made in furtherance of petition or speech rights in connection with an issue of public interest.

We affirm the denial of appellant's anti-SLAPP motion. Appellant failed to show OCB's cross-claims arose from post-litigation statements. He also failed to show that any pre-litigation statements were made in good faith anticipation of litigation under serious consideration, as required to establish protection under Subdivision (e)(2). His failure to rely on Subdivision (e)(4) in the trial court forfeited his reliance on that subdivision on appeal, and in any event, he failed to make the requisite showing of public interest.

PROCEEDINGS BELOW

A. Appellant's Underlying Complaint

OCB is a nonprofit religious corporation formed in 1964 for the purpose of owning and handling real property for the Church. The same year, OCB and the Church entered into a contract, which established OCB's bylaws. In 2013, appellant became the Parish Rector of the Church. By virtue of that position, appellant became a member of OCB's Board of Directors, with voting rights.

On December 24, 2018, appellant and the Church filed this action against OCB.¹ Appellant and the Church alleged

¹ According to his declaration in support of his anti-SLAPP motion, appellant retained counsel to represent him in this matter on November 1, 2018, after having learned "[a]t some point in the fall of 2018" that OCB sought to amend its bylaws. After filing their original complaint in December 2018, appellant and the Church filed their operative, first amended complaint in
(*Fn. is continued on the next page.*)

that on November 6, 2018, the Church notified OCB that it was exercising its alleged right under the bylaws to purchase certain real property from OCB, but OCB thereafter refused to make the required sale. They further alleged that OCB had refused to recognize the alleged voting rights of the Church and its priests. Appellant asserted a cause of action for declaratory relief, seeking a declaration that he and the Church's other priests were members of OCB's board of directors with all attendant rights, including voting rights. The Church asserted a cause of action for a similar but broader declaration, as well as a cause of action for breach of contract, seeking specific performance of OCB's alleged obligation to sell real property to the Church.

B. OCB's Cross-Complaint

On March 28, 2019 (some three months after appellant and the Church initiated this action), OCB filed a cross-complaint against appellant and the Church. In its background allegations, OCB alleged that "over at least the last year" (i.e., from March 2018, at the latest, to March 2019), appellant had spread lies to Church members about, inter alia, the alleged requirement for OCB to sell real property to the Church. It further alleged that appellant's motive was to centralize power in the Church -- thereby

February 2019. The parties agree that aside from an additional attachment, the amended complaint is identical to the original.

centralizing power in himself -- to further his own agenda, contrary to the best interests of OCB and the Church itself.

The cross-complaint contained two causes of action: breach of fiduciary duty and defamation. Each count incorporated the background allegations by reference. Within its breach of fiduciary duty count, OCB alleged that appellant had advocated the property sale and spread unspecified lies about OCB and its leadership. Within its defamation count, it alleged that appellant had made several defamatory statements about OCB in connection with, *inter alia*, the alleged requirement to sell the property.

C. Appellant's Anti-SLAPP Motion

In May 2019, appellant filed an anti-SLAPP motion, asking the trial court to strike OCB's cross-complaint in its entirety. He argued both cross-claims arose from alleged statements he made in connection with an issue under review or consideration in this action, which were protected under Subdivision (e)(2). He emphasized that the cross-complaint was bereft of detail concerning the context and content of his alleged statements. In a supporting declaration, he similarly asserted that the cross-complaint failed to set forth the alleged statements' content, recipients, and timing, and declared that its ambiguity prevented him from fully responding to the allegations against him. He nevertheless declared, "Any statements that I may have made regarding the bylaws and the actions of OCB were made in connection with this matter." He attached

correspondence between the parties' counsel, but otherwise submitted no evidence.

In its opposition to the anti-SLAPP motion, OCB acknowledged that its cross-claims arose from statements appellant had made, but argued "the complained of statements" were made well before appellant and the Church filed this action. It argued Subdivision (e)(2) did not protect these pre-litigation statements because they were not made in good faith anticipation of litigation under serious consideration at the time the statements were made.

In his reply brief, appellant argued OCB bore the burden of proof on the factual issue whether his alleged statements were made in serious, good faith anticipation of litigation. He further argued OCB failed to satisfy that burden, again emphasizing that OCB had failed to specify the content of his alleged statements or when, where, and to whom they were made.

The trial court denied appellant's anti-SLAPP motion on the ground that he failed to meet his burden, at the first anti-SLAPP step, to show that the cross-claims arose from protected activity. It focused on the defamation claim -- finding that the breach of fiduciary duty claim arose from "the same or similar" statements -- and concluded appellant had failed to show that the claim was based on any statements made after he filed his complaint in December 2018. Noting that caselaw contradicted appellant's attempt to place the burden of proof on OCB, the court further concluded appellant had failed to show that any such

statement was made in good faith anticipation of litigation under serious consideration at the time the statement was made, as required to establish protection for pre-litigation statements under Subdivision (e)(2). Appellant's mere declaration that the pre-litigation statements were made "in connection with" this action was insufficient. Finally, the vagueness of OCB's allegations did not assist appellant, as caselaw demonstrated that "vague pleadings can prevent application of the anti-SLAPP statute."

Appellant timely appealed.

DISCUSSION

Appellant contends the trial court erred in denying his motion to strike OCB's cross-complaint under the anti-SLAPP statute. Appellant does not challenge the trial court's finding that OCB's two cross-claims arose from "the same or similar" statements. On the contrary, he also analyzes the breach of fiduciary duty claim together with the defamation claim. We will do the same.

We review de novo a trial court's decision on an anti-SLAPP motion. (*Monster Energy Co. v. Schechter* (2019) 7 Cal.5th 781, 788.) Our Supreme Court has summarized the two-step analysis required by the anti-SLAPP statute as follows: "At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. . . . If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is

reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. . . . If [the plaintiff fails to satisfy this burden], the claim is stricken.” (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396.) The trial court denied appellant’s motion at the first step.

A. First-Step Anti-SLAPP Principles

“At the first step of the [anti-SLAPP] analysis, the defendant must make two related showings. Comparing its statements and conduct against the statute, it must demonstrate activity qualifying for protection. [Citation.] And comparing that protected activity against the complaint, it must also demonstrate that the activity supplies one or more elements of a plaintiff’s claims.” (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 887.) In other words, the defendant must show that the claim arises from protected activity. (See *id.* at 884, 887-888.) “[A] claim does not ‘arise from’ protected activity . . . when protected activity merely provides evidentiary support or context for the claim.” (*Rand Resources, supra*, 6 Cal.5th at 621.)

Under Subdivision (e)(2), the anti-SLAPP statute protects “any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law” (Code Civ. Proc., § 425.16, subd. (e)(2).) We and other courts have interpreted Subdivision (e)(2) to protect statements made in connection

with issues that *later* become subject to consideration or review in litigation, but only where such pre-litigation statements were made in good faith anticipation of litigation under serious consideration at the time the statements were made. (See, e.g., *Bailey v. Brewer* (2011) 197 Cal.App.4th 781, 789-790 (*Bailey*).)

Under Subdivision (e)(4), the anti-SLAPP statute protects “any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (Code Civ. Proc., § 425.16, subd. (e)(4).) The connection with an issue of public interest is a factual issue, on which the moving defendant bears the burden. (See *Rand Resources, supra*, 6 Cal.5th at 626 [defendants failed to meet evidentiary burden on their argument that misrepresentations of city agent’s identity were connected to issue of public interest].)

“A defendant appealing [the denial of] a special motion to strike, may not change his theory of the case for the first time on appeal.” (*Bikkina v. Mahadevan* (2015) 241 Cal.App.4th 70, 92 (*Bikkina*), citing *Flatley v. Mauro* (2006) 39 Cal.4th 299, 321, fn. 10 (*Flatley*).)

B. Post-litigation Statements

Appellant failed to show that OCB’s cross-claims arose from any statements he made after filing this action

(post-litigation statements).² OCB's background allegations indicated that the defamatory statements began, at the latest, in March 2018 -- some nine months *before* appellant filed suit. Though the background allegations also made passing reference to post-litigation statements, that reference was consistent with reliance on those statements merely for "evidentiary support or context for the claim[s]." (*Rand Resources, supra*, 6 Cal.5th at 621; see also *Spencer v. Mowat* (2020) 46 Cal.App.5th 1024, 1031, 1036-1040 [complaint against anti-SLAPP movant who allegedly conspired to commit various torts against non-local surfers did not arise from protected activity, notwithstanding complaint's allegations that anti-SLAPP movant petitioned city in furtherance of the conspiracy; plaintiffs relied on petitioning activity merely as evidence of conspiracy, not to supply element of any tort claim].) Within its defamation count, OCB alleged only that appellant "made several statements," without any hint that those statements were made post-litigation. Though the count was vague regarding whether the statements were instead made pre-litigation, appellant could not rely on that vagueness to meet his first-step burden. (See *Yeager v. Holt* (2018) 23 Cal.App.5th 450, 454-457, 460 [complaint's vagueness did not help defendant in his failed attempt to establish that complaint arose from

² OCB neither disputes nor concedes that any post-litigation statements were protected, instead arguing that any protection for such statements is immaterial because appellant failed to show that the cross-claims arose from such statements.

his prior fee-collection litigation against plaintiff, where complaint referenced actions taken in collection case but also alleged that some of defendant's improper actions were taken after collection case was tried]; *Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 627-628 [plaintiff's failure to specifically plead allegedly defamatory statements made it "difficult, if not impossible, to see how defendants could have met th[eir] burden" to show statements were based on act in furtherance of their petition or speech rights].)

In sum, because appellant failed to show that either of OCB's claims arose from post-litigation statements, he could not use such statements to satisfy his first-step burden. (See *Gaynor v. Bulen* (2018) 19 Cal.App.5th 864, 869-870, 879-880, 887 [defendant failed to meet first-step burden, despite identifying allegations of protected litigation activity, where defendant failed to demonstrate any claim arose from those allegations].)

C. Pre-litigation Statements

There is no dispute that OCB's cross-claims arose, at least in part, from statements appellant made before he and the Church filed this action. As in the trial court, appellant argues these pre-litigation statements were protected under Subdivision (e)(2). For the first time on appeal, appellant alternatively argues that his pre-litigation statements were protected under Subdivision (e)(4).

1. *Subdivision (e)(2)*

Appellant failed to show that any of the alleged pre-litigation statements were protected under Subdivision (e)(2). (Code Civ. Proc., § 425.16, subd. (e)(2) [anti-SLAPP statute protects “any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law”].) We acknowledge that appellant’s pre-litigation statements, as pleaded, were made in connection with at least one issue that later became subject to consideration or review in this action, viz., the alleged contractual requirement for OCB to sell real property to the Church. However, a pre-litigation statement is protected under Subdivision (e)(2) only where the statement was made in good faith anticipation of litigation under serious consideration at the time the statement was made (the serious-consideration requirement). (See, e.g., *Bailey, supra*, 197 Cal.App.4th at 789-790.) Here, neither the pleadings nor the evidence established that appellant was seriously considering bringing this action at the time he made his alleged statements. Indeed, in his anti-SLAPP briefing and supporting declaration, appellant emphasized that the context of the alleged statements was a near-total mystery. On appeal, appellant makes little

attempt to argue that he satisfied the serious-consideration requirement, instead urging us to discard the requirement.³

We decline to discard the serious-consideration requirement, which is supported by precedent -- including our own -- that has been cited with approval by our Supreme Court. In *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280 (*20th Century*), we held that Subdivision (e)(2) did not protect the defendants' creation and submission of allegedly fraudulent insurance reports, notwithstanding our acknowledgment that the reports eventually could be used in litigation (and that some had been so used), where there was no litigation pending at the time the reports were created and submitted. (*20th Century, supra*, at 284-286.) In a similar case, *People ex rel. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809 (*Anapol*), the trial court relied on *20th Century* in denying the defendants' anti-SLAPP motions, and our colleagues in Division Three affirmed, reasoning that the defendants' "bald assertions that the [insurance] claims were submitted with the subjective intent that litigation would follow are insufficient, without more, to constitute prima facie evidence that the insurance claims constituted

³ Appellant suggests the pleadings satisfied the serious-consideration requirement because his statements, as pleaded, concerned a dispute that "only litigation could resolve." However, he makes no attempt to explain why informal dispute resolution was unavailable, or how the pleadings purportedly established such unavailability.

[protected] prelitigation conduct.” (*Anapol*, *supra*, at 814-815, 828-830.) The *Anapol* court expressly applied the serious-consideration requirement. (*Id.* at 824, 828-829.) Our colleagues in Division Two later cited *Anapol* for the proposition that “preparatory communications do not qualify as a protected activity if future litigation is not anticipated, and is therefore only a ‘possibility’ -- and this is true even if the communication is a necessary prerequisite to any future litigation.” (*Mission Beverage Co. v. Pabst Brewing Co., LLC* (2017) 15 Cal.App.5th 686, 703-704, citing *Anapol*, *supra*, at 827-828.) Quoting the same proposition and citing *20th Century*, our Supreme Court recently agreed with the refusal of the Courts of Appeal to “presume” speech is protected under Subdivision (e)(2) “when no official proceeding was pending at the time of the speech.” (*Rand Resources*, *supra*, 6 Cal.5th at 627.) The court held that a statement was unprotected by Subdivision (e)(2) despite its relation to an issue reviewed by a city council about two years later, explaining that the statement did not refer to the council’s review process and that “[u]nder consideration or review’ does not mean any issue a legislative body may conceivably decide to take up months or years in the future.” (*Rand Resources*, at 627.) Thus, the court tacitly approved the serious-consideration requirement.

The cases on which appellant relies do not assist him. In *Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924 (*Bel Air*), the court cited caselaw on the serious-consideration requirement with approval; it merely

distinguished the cited cases on the ground that they concerned the “mere hypothetical possibility” of litigation, whereas the claims before it arose from the defendants’ active and “serious” encouragement of litigation. (*Id.* at 941; see also *id.* at 942 [identifying evidence of “serious nature of this alleged encouragement,” defendants’ “serious litigation strategy,” and “serious interest [among targets of defendants’ encouragement] in retaining the right to sue”].) Indeed, the *Bel Air* court recognized the value of the serious-consideration requirement, stating, “The requirement to show that litigation is seriously contemplated ensures that prelitigation communications are actually connected to litigation and that their protection therefore furthers the anti-SLAPP statute’s purpose” (*Id.* at 941.) In *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106 (*Briggs*), our Supreme Court found that a nonprofit’s counseling of a tenant with regard to a habitability issue, about which the tenant successfully sued the defendants, was protected conduct in anticipation of litigation. (*Id.* at 1115.) As appellant observes, the court did not articulate the serious-consideration requirement. (See *ibid.*) We do not read this omission as a rejection of the requirement, particularly because the primary issue in *Briggs* concerning the scope of Subdivision (e)(2) was whether the subdivision requires a separate showing of public significance -- not the circumstances in which the subdivision applies to pre-litigation statements. (See *id.* at 1109, 1113.) Indeed,

the *Bel Air* court, after citing caselaw on the serious-consideration requirement with approval, expressly described *Briggs* as consistent with its own observation that “[a] statement has a sufficient ‘connection’ with anticipated litigation if the person making the statement is engaged in a *serious* effort to encourage or counsel litigation by another.” (*Bel Air, supra*, at 943, italics added.)

In sum, because appellant failed to show that any of the pre-litigation statements from which OCB’s cross-claims arose were made in good faith anticipation of litigation under serious consideration at the time the statements were made, the trial court did not err in rejecting appellant’s argument that they were protected under Subdivision (e)(2).

2. Subdivision (e)(4)

By failing to argue before the trial court that his statements were protected under Subdivision (e)(4), appellant forfeited this argument on appeal. (See *Flatley, supra*, 39 Cal.4th 299 at 321, fn. 10 [anti-SLAPP movant forfeited reliance on Subdivision (e)(2) on appeal by relying only on other subdivisions in trial court].) Contrary to appellant’s contention, the applicability of Subdivision (e)(4) is not a purely legal issue that we could resolve on undisputed facts. The subdivision protects conduct in furtherance of the exercise of petition or speech rights only where that conduct is in connection with an issue of public interest. (Code Civ. Proc., § 425.16, subd. (e)(4).) The purported connection between appellant’s statements and an

issue of public interest is a factual issue, on which appellant bears the burden. (See *Rand Resources, supra*, 6 Cal.5th at 626.) Appellant neither developed the record on this factual issue nor put OCB on notice of any need to develop it. We therefore decline to exercise our discretion to decide the issue on its merits. (See *Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, 1526 [anti-SLAPP opponent forfeited argument that broadcasting company's hiring decisions lacked connection to issue of public interest within meaning of Subdivision (e)(4), where he failed to raise argument in trial court]; cf. *Bikkina, supra*, 241 Cal.App.4th at 92-93 [declining to exercise discretion to review anti-SLAPP movant's statute of limitations argument, where movant failed to raise argument in trial court and parties had not developed factual record].)

Were we to decide the merits on the limited record before us, we would reject appellant's contention that his statements were made in connection with an issue of public interest. The pleadings and evidence indicate that OCB and the Church are closely affiliated entities serving the same church community -- OCB was formed to own and handle real property for the Church, and the two entities' leadership overlaps, as shown by appellant's claim to voting rights on OCB's board of directors by virtue of his leadership position in the Church. The pleadings and evidence further indicate that appellant's alleged statements concerned a dispute between himself and the Church, on the one hand, and OCB, on the other, regarding the degree of influence he and the

Church could exercise over OCB, and vice versa. But even assuming, arguendo, that issues of interest to this specific church community are issues of public interest, the pleadings and evidence fail to establish that the church community at large has any interest in the two camps' relative degrees of influence. The only evident disagreement between the two camps concerns whether OCB would sell certain real property to the Church. Appellant has identified no evidence that the prospective transfer of ownership would affect the broader church community. It is speculative, on the limited record before us, whether appellant's statements concerned anything more than a private power struggle, of interest primarily to the competitors themselves and their personal allies. (See *Donovan v. Dan Murphy Foundation* (2012) 204 Cal.App.4th 1500, 1506-1509 (*Donovan*) [anti-SLAPP statute did not protect series of disputes among nonprofit foundation directors over corporate governance and financial oversight, culminating in former director's removal: "[T]he fact that the Foundation is one of the largest charitable organizations in Southern California, subject to public oversight by the Attorney General, and that it donates a substantial amount of money every year to persons and entities that affect millions of Southern Californians . . . [does not] transform a private disagreement among directors of the Foundation into a public issue"].)⁴

⁴ To support his contention that his statements were made in connection with an issue of public interest, appellant relies (*Fn. is continued on the next page.*)

In sum, appellant’s argument that Subdivision (e)(4) protected his pre-litigation statements is forfeited and, in any event, is unavailing on the limited record before us.

principally on anti-SLAPP caselaw concerning homeowners associations. In *Donovan*, we noted that “[c]onduct involving homeowners associations generally involves a matter of public interest because a homeowners association is akin to a governmental entity,” and distinguished caselaw concerning such conduct on the ground that the record before us included no evidence that the nonprofit foundation at issue “affect[ed] a community in a manner similar to that of a governmental entity.” (*Donovan, supra*, 204 Cal.App.4th at 1507, fn. 3, 1509, fn. 4.) Here, similarly, there is no evidence that the Church functions as a quasi-governmental entity.

DISPOSITION

The judgment is affirmed. OCB is awarded its costs on appeal.

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MANELLA, P. J.

We concur:

COLLINS, J.

CURREY, J.